No. 751

In the

Supreme Court of the United States

October Term, A. D. 1954

WEST TEXAS UTILITIES COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FRANK CAIN,
830 Mercantile Bank Building,
Dallas, Texas.
Attorney for Petitioner.

Of Counsel:

JULIUS A. TRACY, JR.,
830 Mercantile Bank Building,
Dallas, Texas.

IRION, CAIN, BERGMAN AND COCKE,
830 Mercantile Bank Building,
Dallas, Texas.

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, West Texas Utilities Company, respectfully petitions this Honorable Court for a writ of certiorari to review the decree of the Court of Appeals for the Fifth Circuit rendered in this cause on the 4th day of February, 1955, and to also review an order of the Court of Appeals for the Fifth Circuit rendered in this cause overruling a motion for rehearing *en banc* in this cause on the 22nd day of March, 1955, and respectfully shows the following:

I

JURISDICTIONAL STATEMENT

1. The date of the decree sought to be reviewed by a writ of certiorari is February 4, 1955.

2. The date of the order overruling motion for rehearing *en banc* likewise sought to be reviewed by a writ of certiorari is March 22, 1955.

3. The date of the order staying the execution of the decree of the Court of Appeals for the Fifth Circuit is the 31st day of March, 1955, and said order stays the execution of the decree for thirty days from such date in order that your petitioner might petition this Court for a writ of certiorari.

4. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

II

QUESTIONS PRESENTED FOR DETERMINATION

1. Did the Court of Appeals for the Fifth Circuit err in denying the motion of Respondent for rehearing *en banc* of this cause in that no rules have been heretofore adopted for proceedings in such matters by this Circuit in accordance with 28 U. S. C., Section 46(c) as interpreted by this Court in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company, 345 U. S. 247, 73 Sup. Ct. 656, 97 L. Ed. 986?*

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2. Did the Court of Appeals for the Fifth Circuit err in its decree for this cause, in that no opinion was written and based upon the only possible interpretation which such a decision could have, causes a direct conflict between this case and the decision of this same Court of Appeals with one of its former decisions recently decided in *National Labor Relations Board v. Steinberg, 182 F. 2d 850,* and in conflict also with the case of *National Labor Relations Board v. Carroll, 120 F. 2d 457,* decided by the United States Court of Appeals for the First Circuit?

3. Does this decision of the Court of Appeals being contra to the undisputed facts in this case set forth by the undisputed evidence in the record and testimony submitted below cause a complete and direct conflict with the letter, spirit and intent of the law as has been formerly decided in other Courts of Appeal and in this Court?

III

STATUTES AND REGULATIONS INVOLVED IN THIS CAUSE

Title 28, Section 46(c), United States Code

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service. A court in banc shall consist of all active Circuit Judges of the Circuit.

IV

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action brought in the United States Court of Appeals for the Fifth Circuit by the National Labor Relations Board, as petitioner, against West Texas Utilities Company, as respondent, for the enforcement of its order issued by the National Labor Relations Board against West Texas Utilities Company on April 23, 1954, in Case Nos. 16-CA-411, 16-CA-466 and 16-CA-545 pursuant to Section 10(e) of the National Labor Relations Act as amended *(51 Stat. 136, 29 U. S. C., Section 151, et seq.)*, following the usual proceedings under Section 10 of the Act. The Board's decision and order is reported in 108 N. L. R. B. No. 80, subsequent to which time the Board issued its order denying Respondent's motion for a reconsideration on May 25, 1954.

The Board order cites the finding that Respondent, West Texas Utilities Company, is guilty of a violation of Section 8(a) (3) of the Act, and merely incidentally thereto Section 8(a) (1), in objecting to the employment by Respondent's independent contractor, Southwest Electric Company, of a man who was a paid Union organizer who made repeated threats against Respondent.

The question presented below was fundamentally whether the Respondent could be held responsible for an alleged discrimination against the employee of an independent

contractor and as to whether the Board's coined phrase "intimate business character" abrogates the law of agency.

Another question submitted to the court below was whether there was evidence on the record as a whole to support the Board's finding that Respondent, West Texas Utilities Company, would be accountable under Section 8(a) (3) of the Act for discrimination against the employee even if the question presented above was decided against the Respondent. The record is uncontroverted that the employee was a Union organizer and had made repeated threats against Respondent.

To these questions, the Board had found previously that Southwest Electric Company was effectually an independent contractor in its relations with Respondent and that the contract between Southwest and Respondent delegated complete authority from Southwest to Respondent for Respondent to remove any employee from Southwest's job. The Board further found that Southwest had refused the alleged discriminated employee employment because Respondent had objected to him on the ground that he was a Union organizer and because he had made threats of economic destruction against Respondent, and it was also conceded that the employee was in fact a Union organizer and had made repeated threats against West Texas Utilities Company.

Upon the petition of the National Labor Relations Board for enforcement of its order, and after receiving the briefs and argument of counsel for both parties to this contro-

versy, the Court of Appeals for the Fifth Circuit issued its per curiam decision without opinion on February 4, 1955, granting the petition for the enforcement of the order of the National Labor Relations Board.

Immediately thereafter, Respondent, West Texas Utilities Company, petitioner in this Court, filed its motion for rehearing *en banc* setting forth the direct conflict in the decision in this case with one of the court's own decisions recently decided, and also pointing out the conflict which this decision would cause with another decision out of the United States Court of Appeals for the First Circuit.

Respondent thereafter amended its motion for rehearing *en banc* setting forth, that this Circuit has failed to amend it rules regarding application for rehearing *en banc* consistent with 28 U. S. C., Section 46(c), and requesting further that this matter be referred to and heard by the Court *en banc* pursuant to 28 U. S. C., Section 46(c), by virtue of the conflict in opinion heretofore referred to, and by virtue of the fact that at the time of filing the motion for rehearing *en banc* only one active Circuit Judge remained of the panel to act on the motion for rehearing.

The Court overruled the petition for rehearing *en banc* by a decision of the same division which heard the matter originally and without proper presentation of the motion to the whole Court.

Respondent below then moved that the decree be stayed pending the filing by Respondent of an application for a

writ of certiorari to this Court, which stay was granted by the Court for a period of thirty days.

V

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of said Court of Appeals in overruling Respondent's, West Texas Utilities Company, motion and amended motion for rehearing *en banc* without a proper presentation of the matter to the whole court for determination as to the granting of such motion is in conflict with the recent decision of this Court in the interpretation of 28 U. S. C., Section 46(c), in *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al., 345 U. S. 247, 73 Sup. Ct. 656, 97 L. Ed. 986.*

The Court of Appeals for the Fifth Circuit has failed to amend or change their rules of procedure or set up a rule of procedure whereby a litigant might file its motion for a hearing or rehearing *en banc* for consideration by the complete court or by a division of said court so delegated by the majority for such purposes.

Without this procedure being previously outlined by the Court, a litigant is left in the dubious position as to what is to be required of him in the proper presentation of his petition for a hearing or rehearing *en banc* before the complete court.

In the case at bar the court has established no procedure whereby a motion for rehearing *en banc* is to be processed

and heard either by the court as a whole or through its authorized delegation to a division in accordance with a certain prescribed set of rules and regulations, and since no such procedure has been so provided, the Fifth Circuit is left with but one alternative where a litigant has requested and petitioned for a hearing *en banc*, and that is to proceed with the presentation and determination of such petition or motion before the complete court in that no delegation of power has been created.

This was not done in the instant case. The motion for rehearing *en banc* was acted upon by the same division of the court who heard the original appeal, with only one of the judges being an active judge of the court at the time, and, therefore, was acted upon summarily in a manner not authorized by the complete court in accordance with 28 U. S. C., Section 46(c) as interpreted by the *Western Pacific Railroad* case, supra, and such action was an error detrimental to the rights of this Respondent.

Therefore, since there has been no delegation of power by the complete court as suggested in the *Western Pacific Railroad* case and inasmuch as said motion for rehearing *en banc* in the instant case was summarily overruled by the division originally hearing said appeal, this action of the court was without authority, and the matter should be vacated and remanded with direction to comply with the provisions set forth in 28 U. S. C., Section 46(c), as interpreted by the *Western Pacific Railroad* case.

Also, a similar interpretation of the question here presented was involved in the case of *William H. Banks Ware-*

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house, Inc., et al. v. Watt, et al., 345 U. S. 932, 73 Sup. Ct. 793, 97 L. Ed. 1361, and *Bradley Mining Company v. Boice, 345 U. S. 932, 73 Sup. Ct. 797, 97 L. Ed. 1361.*

Petitioner, West Texas Utilities Company, deemed that the urgency and importance of the issues so decided by the Court of Appeals for the Fifth Circuit are such as to warrant a rehearing *en banc* by virtue of the conflict in decisions, and is entitled to a determination by the whole Court pursuant to 28 U. S. C., Section 46(c), to a consideration of such request.

2. The decision of said Court of Appeals being per curiam without an opinion and therefore giving no statements or findings of the Court in arriving at such a decision, leaves Respondent, West Texas Utilities Company, in a most difficult position to determine upon what possible grounds the Court ordered enforcement of the National Labor Relations Board order in this case in the absence of an opinion.

The only possible way the Court could have so determined was to have held that the employer, Southwest Electric Company, of the employee allegedly discriminated against was in fact the agent of Respondent, West Texas Utilities Company, and was not an independent contractor. To arrive at such a decision based upon the undisputed evidence in this case, creates a direct conflict by this Court with one of its own decisions recently decided in *National Labor Relations Board v. Steinberg, 182 F. 2d 850,* and likewise in conflict with the case of *National Labor Rela-*

tions Board v. Carroll, 120 F. 2d 457, decided by the United States Court of Appeals for the First Circuit.

WHEREFORE, your Petitioner, West Texas Utilities Company, prays that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Fifth Circuit had in the case numbered and docketed Docket No. 15186, National Labor Relations Board, Petitioner v. West Texas Utilities Company, Respondent, in that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Fifth Circuit and the National Labor Relations Board as has previously decided be reversed by this Court, and for such further relief as to this Court may seem proper.

DATED April 25, 1955.

FRANK CAIN,
830 Mercantile Bank Building,
Dallas, Texas.
Attorney for Petitioner.

Of Counsel:
JULIUS A. TRACY, JR.,
830 Mercantile Bank Building,
Dallas, Texas.

IRION, CAIN, BERGMAN AND COCKE,
830 Mercantile Bank Building,
Dallas, Texas.

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I certify that copies of this Petition hve been served by air mail as follows:

1. GENERAL COUNSEL
   National Labor Relations Board
   Washington, D. C. — 1 copy

2. MR. A. NORMAN SOMERS
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

3. MR. DAVID P. FINDLING
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

4. MR. MARCEL MALLETT-PREVOST
   Assistant General Counsel
   National Labor Relations Board
   Washington, D. C. — 1 copy

5. MR. FREDERICK U. REEL
   Attorney, National Labor Relations Board
   Washington, D. C. — 1 copy

6. SOLICITOR GENERAL
   Department of Justice
   Washington 25, D. C. — 1 copy

Frank Cain

FRANK CAIN

SWORN TO AND SUBSCRIBED BEFORE ME this 25th day of April, 1955.

Reba Bailey

Reba Bailey
Notary Public,
Dallas County, Texas.

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15186

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEST TEXAS UTILITIES COMPANY,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

(February 4, 1955.)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM:

The petition for enforcement of the order of the National Labor Relations Board is granted.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15186

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEST TEXAS UTILITIES COMPANY,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

ON RESPONDENT'S MOTION FOR ORAL ARGUMENT AND PETITION FOR A REHEARING

(March , 1955.)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge.

BY THE COURT:

It is ordered that the motion for oral argument in the above styled and numbered cause be, and the same hereby is, overruled, and that the petition for rehearing be, and the same hereby is, denied.